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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ARDRA INSURANCE COMPANY, LTD., et al.,
Petitioners,

vs.

SALVATORE R. CURIALE, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF NASSAU INSURANCE COMPANY, IN LIQUIDATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

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Reply to Brief in Opposition

Instead of addressing the reasons for granting certiorari, the Respondent's Brief in Opposition ("Opp. Br.") raises the frivolous claim that this Court lacks jurisdiction to hear the petitioner's appeal, argues the merits of the case, attacks the lower court's order as "mistaken" in certain respects, and urges this Court to allow the decision below to stand in order not to "eradicate important substantive and procedural protections" that the Liquidator believes

he now enjoys.[1] The Liquidator's brief does not, however, undercut any of the four separate reasons for granting certiorari.[2]

A. The Liquidator argues that this Court lacks jurisdiction "[b]ecause the decision below rests on independent and adequate state law grounds." Opp. Br. at 4 (citing, *inter alia*, *Michigan v. Long*, 463 U.S. 1032 (1983)). In *Long*, however, this Court made clear that it "will not assume that a state-court decision rests on adequate and independent state grounds when the 'state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not

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[1] Opp. Br. at 4-6, 6-9, 10, 17.

[2] Petition for Writ of Certiorari ("Cert. Pet.") at 13-15.

clear from the face of the opinion.'" *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (quoting *Long*, 463 U.S. at 1040-41). *Accord New York v. P.J. Video, Inc.*, 475 U.S. 868, 872 n.4 (1986); *Michigan v. Chesternut*, 486 U.S. 567, 571 n.3 (1988).

The Liquidator himself says the lower court's citation of the McCarran-Ferguson Act "suggests [the Act] was a steppingstone by which the court reached state law to interpret the Convention's exceptions." Opp. Br. at 11. In a word, the New York State Court of Appeals applied a federal law in order to reach state law which it used to modify a federal treaty. There is no independent and adequate state law ground anywhere in that remarkable progression.[3]

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[3] The Liquidator also argues that "[s]tate law determines whether a contract containing an agreement to arbitrate is binding upon a (continued...)

B. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, this Court refused to "subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress [had] not expressly directed the courts to do so." 473 U.S. 614, 639 n.21 (1985). In contrast, the New York Court of Appeals held that the "subject matter of the claims against Ardra must be litigated in [New York] Supreme Court," relying upon its own thirty-year-old case that created a unique, judicially-implied exception to arbitrability. A:16. The court found that the arbitration clauses are "null

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[3](...continued)
particular party," Opp. Br. at 5, and cites for this proposition *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989). In *Volt*, this Court held that, where the parties had agreed in the contract to abide by state rules of arbitration, those state rules should be applied. 489 U.S. at 477. There is no such provision in the reinsurance contracts at issue here.

and void, inoperative or incapable of being performed," pursuant to Article II(3) of the Convention, and that this contract action is not a subject matter capable of settlement by arbitration, pursuant to Article II(1). Both findings are contrary to *Mitsubishi*.

The direct conflict between New York's highest court and this Court on the interpretation of a treaty merits granting the petition. *Duren v. Missouri*, 439 U.S. 357, 363 (1979). *See also Hudson v. Louisiana*, 450 U.S. 40, 42 (1981); *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 14 (1974); Supreme Court Rule 10.1(c). As the Court recently stated, "[t]he object of our granting writs of certiorari on points of statutory or treaty interpretation is to determine the correctness of fundamental points that lower courts have resolved . . . ." *Chan v. Korean Air*

Lines, Ltd., 490 U.S. 122, 134 n.5 (1989). The order of the court below certainly involves a fundamental issue: whether state courts can carve out exceptions to a treaty of the United States with eighty-five other nations.

The Liquidator argues that the holding below is a "straightforward" application of certain unspecified Article II(3) exceptions. Opp. Br. at 7. The Liquidator, however, cannot cite any decision from any other United States court that has made any exception to the enforcement of arbitral agreements under the Convention. He, therefore, analogizes the liquidation of an insolvent insurer to a bankruptcy proceeding and relies upon a Third Circuit decision for the proposition that "[e]nforcement of a bankrupt's arbitral agreement will be denied where arbitration 'would seriously jeopardize the objectives of the

[Bankruptcy] Code.'" Opp. Br. at 8 (quoting *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1161 (3d Cir. 1989)).

In *Hays*, the Third Circuit held precisely to the contrary:

> Where . . . a trustee seeks to enforce a claim inherited from the debtor in an adversary proceeding in a district court, we perceive no adverse effect on the underlying purposes of the Code from enforcing arbitration -- certainly no adverse effect of sufficient magnitude to relieve a district court of its mandatory duty under the Arbitration Act as interpreted in the recent case law.

Id. The Third Circuit, relying on the "strong federal policy favoring arbitration," as set forth in this Court's recent decisions, and citing numerous other district and bankruptcy court decisions honoring arbitration agreements in pre-petition contracts, explicitly rejected the Liquidator's arguments. *Id.* at 1153 n.4, 1161 n.21.

C. The Liquidator suggests that the court below did not necessarily hold that the liquidation of an insolvent insurance company constitutes the regulation of the business of insurance under the McCarran-Ferguson Act, Opp. Br. at 9-10, faults the Court of Appeals for not discussing the reasons for its holding, Opp. Br. at 11, and even argues that the court below "mistakenly *diminished*" the McCarran-Ferguson Act's "role in the case." Opp. Br. at 10. As already noted, however, the Liquidator ultimately concedes that the statute "was a steppingstone by which the Court reached state law to interpret the Convention's exceptions." Opp. Br. at 11.

The Liquidator then attacks the reasoning of the Fourth and Ninth Circuits in *Gordon v. Department of the Treasury*, 668 F. Supp. 483 (D. Md. 1987),

aff'd, 846 F.2d 272 (4th Cir. 1988), *cert. denied*, 488 U.S. 954 (1988), and *Idaho ex rel. Soward v. United States*, 858 F.2d 445 (9th Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989). These arguments do not dispel the conflict between those Circuits and the highest court of the State of New York.

The Liquidator argues, in the alternative, that even if *Soward* and *Gordon* were correctly decided, they were limited to a "single . . . aspect" of insurer insolvency, the priority of claims payments. Opp. Br. at 15. *Soward* and *Gordon* were concerned with far more than that. The District Court in *Gordon*, whose opinion the Fourth Circuit adopted, considered other aspects of the Maryland Insurance Code that dealt with insolvency and reviewed the "priority scheme" at issue in the context of the entire "statutory scheme regarding the

liquidation of insolvent insurance companies." 668 F. Supp. at 486.

The court discussed, for example, the Maryland guaranty association which pays all valid covered claims by assessing viable insurance companies, *id.* at 490, and held that "*neither the liquidation statute* nor the priority statute are an 'integral part' of the relationship between the insured and the insurer." *Id.* at 491 (emphasis added). The court considered whether the Maryland liquidation statutes provide for a form of risk transfer and concluded that they do not. *Id.* at 490. The court in *Soward* also discussed the fact that the insurer had ceased to exist and could not conceivably be subject to insurance "regulation" under any existing Idaho statute because it was no longer in existence, much less in business. 858 F.2d at 453.

In short, the New York Court of Appeals necessarily determined that the liquidation of an insolvent insurer is state regulation of the "business of insurance" under the McCarran-Ferguson Act. The Fourth and Ninth Circuits have held it is not. This conflict between the New York court and two federal Courts of Appeals merits review. *See Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 828, 832 n.6 (1988); Supreme Court Rule 10.1(b).

D. The respondent seeks to defeat the Petition with irrelevant allegations. The respondent, for example, characterizes Nassau and Ardra as "the two DiLoreto companies." Opp. Br. at 3, 18. This is an attempt to inject color into the case, but has absolutely no bearing on the Petition. It is true that the Liquidator has *alleged* that Ardra is an "alter ego" of the natural defendants,

but, as he concedes, this "alter ego claim has not yet been determined." Opp. Br. at 18. Moreover, this claim is irrelevant here since it is the Liquidator, who is most certainly not an alter ego of the DeLoretos, who now stands in the shoes of Nassau, and it is the Liquidator who opposes Ardra in this case. The ownership of Ardra has nothing whatever to do with the issue of arbitrability.

The Liquidator cannot boot-strap himself out of an obligation to arbitrate this contract action, which he commenced, by relying upon allegations that are unproven and irrelevant.

E. The respondent and petitioners apparently agree on one point: the issues raised by this case are important. Opp. Br. at 16-18; Cert. Pet. at 54-60. The respondent, however, concludes with the argument that a reversal of the Court of

Appeals' order would "eradicate important substantive and procedural protections" that he, as Liquidator, now enjoys. Opp. Br. at 17.[4] The Liquidator complains that he would lose a "judicial forum," his right of appeal, a "scrupulous application of the pertinent law," and might even have to pay an "arbitrator's fee." Opp. Br. at 16-18. These objections were considered and rejected in *Mitsubishi*, 473 U.S. at 628-40. They are nothing more than a manifestation of hostility to arbitration, demonstrating the "suspicion of arbitration as a method of weakening the protections afforded in the substantive law" that this Court has directed national courts to put aside. *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

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[4] The Liquidator does not explain, however, why other Superintendents have recently arbitrated disputes with Bermudian reinsurers. *See* Cert. Pet. at 41.

CONCLUSION

For the reasons stated above and in Ardra's Petition, a writ of certiorari should be granted.

Respectfully submitted,

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